United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

76-7468

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

H. C. WAINWRIGHT & CO.,

Plaintiff-Appellee,

—against—

WALL STREET TRANSCRIPT CORPORATION and RICHARD A. HOLMAN,

Defendants-Appellants.

On Appeal from an Order of the United States District Court for the Southern District of New York

DEFENDANTS-APPELLANTS' PETITION FOR REHEARING OR REHEARING IN BANC

UNITED STATES COURT OF APPEALS
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PRELIMINARY STATEMENT

Appellants-petitioners (hereinafter "petitioners") respectfully petition this Court for a rehearing or rehearing in banc from a decision rendered June 15, 1977.

In an opinion by Judge Mishler, sitting by designation, joined in by Judges Medina and Oakes, this Court affirmed a superseding preliminary injunction issued by District Judge Lasker.

The issue in this case was misconceived in the District Court and in this Court. It is not the broad question whether the First Amendment supersedes the copyright laws. We recognize that authors of plays, poems and novels are and should be protected by the copyright laws.

The issue is, rather, whether the public can be deprived, through a prior restraint on a newspaper of general circulation, of important news -- in this case financial news -- merely because it has been copyrighted. Stated in other terms, the question is whether persons who have vast power to affect the nature and quality of life in the United States can make statements that have a major impact on the economy and on millions of people, and keep these statements secret from the public. This is a question of the utmost public significance that was neither faced nor discussed here or in the District Court.

In addition, the decisions of the District Court and the Panel are inconsistent with the principles enunciated recently by Chief Judge Kaufman in Edwards v. National Audubon Society, Inc., Nos. 1026-27, slip op. at 3758-59 (2d Cir. May 25, 1977), a case also dealing with copyrighted material:

> In a society which takes seriously the principle that government rests upon the consent of the governed, freedom of the press must be the most cherished tenet. It is elementary that a democracy cannot long survive unless the people are provided the information needed to form judgments on issues that affect their ability to intelligently govern themselves. (Emphasis added)

Accordingly, it is respectfully submitted pursuant to Rule 40 of the Federal Rules of Appellate Procedure that rehearing should be granted in that the Panel either overlooked the actual items being enjoined or misapprehended the far-reaching implications of its affirmance. Alternatively, rehearing in banc should be granted pursuant to Rule 35 of the Federal Rules of Appellate Procedure to review the questions of exceptional importance involved in this case, which has been decided inconsistently with another recent decision by a Panel of this Circuit.

STATEMENT OF FACTS

Petitioners are the owner and the publisher of the Wall Street Transcript ("Transcript"), a weekly newspaper which prints economic, business, and financial news. The Transcript's subscribers include a broad cross-section of the public, including colleges, libraries, lawyers, brokers, accountants and corporations. It is a basic source for news as to what institutional research firms are reporting to institutional clients, and as one of its major features it has a column which specifically reports on these items.

In 1974 the Transcript began publishing articles about financial reports by Plaintiff-respondent, H. C. Wainwright & Co. (hereinafter "plaintiff" or "Wainwright"). Wainwright is an institutional brokerage concern with 900 clients, including banks, insurance companies, mutual funds, investment coun-

sellors, and pension funds in a variety of countries. In April 1976 Wainwright, for purposes of inhibiting media reporting, began copyrighting its reports and protesting the Transcript's continued publication of its reports. The Transcript continued printing articles about Wainwright's reports.

On July 9, 1976 Wainwright instituted an action pursuant to the Copyright Act alleging copyright infringement and unfair trade practices, seeking an injunction and monetary relief. The complaint alleged that five Transcript articles violated five separate copyrights of plaintiffs.

Despite the fact that the Transcript article of July 5, 1976* contained no verbatim reproductions of what was contained in the 40 page Wainwright report and despite the fact that it was a classical news-type summary, plaintiff including it among the allegedly infringing articles.

On August 9, 1976 Judge Lasker granted Wainwright's motion for a preliminary injunction. The injunction restrained and enjoined petitioners, pending the determination of the action, from republishing the five articles or from:

> (b) publishing, selling, marketing or otherwise disposing of any copies of (i) any other abstracts of any of plaintiff's copyrighted Research Reports presented in the format of the feature 'Wall Street Roundup' of The Wall Street Transcript.

On October 1, 1976, Judge Lasker denied a motion by petitioners that he modify the injunction by striking the prohibition against future publication (Jt. Appx. 243a-244a)

On June 15, 1977, this Court in an opinion by Judge Mishler, and joined by Judges Medina and Oakes, affirmed the order below.

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*See Exhibits J and L annexed to the Complaint (Jt. Appx. 81a-123a; 126a).

POINT I

THE PUBLIC HAS A CONSTITUTIONAL RIGHT TO KNOW, AND THE PRESS TO PUBLISH, TRUTHFUL NEWS ACCOUNTS OF INFORMATION THAT VITALLY AFFECTS PRIVATE AND PUBLIC ECONOMIC DECISIONS

It would seem self-evident that the First Amendment squarely protects a newspaper as it reports to members of the public information that concerns their most important economic interests. Financial data contained in brokerage reports are plainly of this character, as they affect the judgments of numerous key investors and decision makers throughout the country. The Supreme Court has on numerous occasions recognized that the First Amendment protects economic speech. For example, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976), the Court per Justice Blackmun stated:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. See Dun & Bradstreet, Inc. v. Grove, 404 U.S. 898, 904-906 (1971)... And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. (Emphasis added)

The approving citation to Dun & Bradstreet, Inc. v. Grove includes the following passage (404 U.S. at 905):

> The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression. When immersed in a free flow of commercial information, private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocations of resources.

(Douglas, J., dissenting from a denial of certiorari.)*

Of course, the rights involved here are not merely those of newspapers. The First Amendment also protects the right of individual members of the public to receive information of interest to them from a willing publisher, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra; Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972).

What plaintiff advises its 900 prominent institutional investors is news of importance to the public at large. And what is being reported by the Transcript and other financial news services is just this news that a well-known and respected institutional research firm is making certain recommendations to its institutional clients.

The vital importance of accurate brokerage reports is well understood in Wall Street financial circles:

> The opinions of today's leading industry specialists are not just market comment; they often are the stuff that makes markets. A well-researched buy or sell recommendation from one of the big brokerage houses, or from a firm noted for its institutional research, may well influence the price of a particular stock for months to come. The Anatomy of Wall Street**(emphasis in original).
>
> Brokerage firms specializing in research services to institutions wield enormous power in the market and can direct tremendous money flows in and out of stocks. Many speculators (and indeed even fund managers) will rush out to buy and sell a stock simply because they believe a large firm is about to recommend some action on it. A Random Walk Down Wall Street.***

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*See also Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41 (1971) (plurality opinion).

**By Louis Stone, Shearson Hayden Stone, Inc.; editors, Charles J. Rolo and George J. Nelson.

***By Burton G. Malkiel, professor of economics and director of the Financial Research Center at Princeton University.

These reports and recommendations are newsworthy; they are discussed on Wall Street; and they are what is reported upon by the Wall Street Journal in stories like that quoted in the Panel's opinion (slip op. at p. 4196-97).* The news is not merely, as the Panel implies, that the company being reported upon did well or poorly, but rather that a particular recommendation and report has been made by a noted institutional research firm.

No one would dream of attempting to restrain a newspaper from reporting a tree-killing frost in Brazil or a major oil strike in Alaska or Iran; the exact nature of such events is of great interest because they determine which commodities and stocks will be in demand. A financial report to hundreds of major institutional investors will, because of its intended and inevitable effects, likewise determine which commodities and stocks will be in demand. And such a financial report will have an important impact on the business health of the country, which depends on private investment to motor the economy. It is news.

But the opinion of the three judge Panel is silent on the question of the public's right to know what is plainly news of interest to the public at large. Whatever the reason for the failure of the Panel to deal with the central issue in this case, it is vital to have a rehearing or a rehearing in banc so that the First Amendment values will not be lost inadvertently.

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*The very day that this motion is being filed the Wall Street Journal carried an extensive account of a Wainwright report on the Chrysler Corporation. Wall Street Journal, June 30, 1977, p. 35.

POINT II

THE RECENT SECOND CIRCUIT DECISION IN EDWARDS V. NATIONAL AUDUBON SOCIETY RECOGNIZES THE "PRESS'S RIGHT OF NEUTRAL REPORTAGE" OF COPYRIGHTED MATERIAL.

In Edwards v. National Audubon Society, Nos. 1026-27 (2nd Cir. May 25, 1977), the Court held that a newspaper could not be held liable, in a defamation action brought by scientists who are public figures, for a news article that fairly and accurately reported charges made in the National Audubon Magazine that the scientists were "paid to lie" on environmental matters. The principle of that decision is flatly inconsistent with the narrow view of the First Amendment taken in this case.

Speaking for the Audubon Society Panel, which included the late Mr. Justice Tom Clark and Judge William Jameson sitting by designation, Chief Judge Irving Kaufman recognized that the press has a "right of neutral reportage" and said in connection with the charges against the plaintiff scientists:

> What is newsworthy about such accusations is that they were made. Slip op. at 3769-70.

It is significant to appreciate that the National Audubon Magazine story was copyrighted, and yet the New York Times article contains a virtually verbatim report of the article. The following chart contains examples which indicate the degree of copying engaged in by the Times, which in the circumstances was of course perfectly appropriate:

New York Times, August 14, 1972	American Birds, April 1972 "Copyright c 1972 by the National Audubon Society, Inc."
...We are well aware...that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the	We are well aware that segments of the pesticide industry and certain paid 'scientist-spokesmen' are citing Christmas Bird Count totals and other data in American Birds as proving that the bird life of North America is thriving, and that many species are actually increasing despite the

widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.	widespread and condemned use of DDT and other non-degradable hydrocarbon pesticides.
...This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons.	This, quite obviously, is false and misleading, a distortion of the facts for the most self-serving reasons.
The truth is that many species high on the food chain, such as most bird-eating raptors and fisheaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this...	The truth is that many species high on the food chain, such as most bird-eating raptors and fisheaters, are suffering serious declines in numbers as a direct result of pesticide contamination; there is now abundant evidence to prove this.

Chief Judge Kaufman expressed the point precisely in the Audubon Society case. What was newsworthy in Audubon Society was that the Audubon Society made certain accusations. What is newsworthy here is that Wainwright has made investment recommendations. Wainwright's reports have direct impact on the market as Wainwright's 900 institutional clients wield enormous economic power. The "neutral reportage," in Judge Kaufman's illuminating phrase, is in this case of financial reports which have a direct economic impact on many people.

POINT III

THE PRELIMINARY INJUNCTION AGAINST THE TRANSCRIPT WILL SEVERELY INTERFERE WITH FINANCIAL NEWS REPORTING TO THE PUBLIC.

Paragraph (b) of the superseding preliminary injunction, affirmed by a Panel of this Court, prohibits the Transcript from publishing descriptions of future Research Reports of the plaintiff. This is a classic prior restraint. The breadth and implications of the injunction can be appreciated if attention is directed to the July 5, 1976 article of the Transcript, further publication of which has also been enjoined (Jt. Appx. 126a). That article is a six-paragraph description of a 40 printed page Wainwright report (Jt. Appx. 83a-123a).

The article was written by counsel and does not contain quotations from the Wainwright report. Rather, as a review of the two documents and of the correspondence between counsel (Jt. Appx. 173a-179a) makes clear, plaintiff's objection to the article was basically that plaintiff was the source for the report.

Thus, a newspaper is enjoined from publishing a brief news article about a 40 page printed report. Paragraph (b) of the injunction also prohibits future news articles about Wainwright reports which have not yet been written, much less copyrighted.

That the courts are not free to enter such injunctions is the central lesson of the Pentagon Papers case, where the federal government sought to enjoin publication of "secret" information that was taken without consent from Government possession. Despite the property interest that the Government had in the papers, the Supreme Court ruled that the First Amendment interests of the press and the public were overriding. New York Times Co. v. United States, 403 U.S. 713 (1971). Here, too, the claim is made that a property interest -- the "copyright" -- permits a prior restraint on the publication of the news by the press. That claim, too, must fall if we are to be faithful to the principles of the First Amendment.

Further, the prior restraint is not justified simply because the facts in this case are initially of economic, rather than political, interest. Economics and politics are closely related; it is plain, for example, that information affecting the ability of major investors to capitalize on a new oil strike could have a far greater impact on the way the nation is governed than a "political" statement in a local election.

Indeed, even information with no political effect is protected by the First Amendment. Recent Supreme Court cases such as Bigelow v. Virginia, 421 809 (1975), and Virginia State Board of Pharmacy v. Virginia Citizens Consumer

Council, Inc., 425 U.S. 748 (1976), establish that even purely "commercial" speech, i.e., speech which, like an advertisement, merely proposes a commercial transaction, enjoys constitutional protection.

But the information which petitioners have published is not simply an advertisement or merely "commercial" information. It is instead information which influences investment decision-making that is of major public importance. See Point I, supra.

The prior restraint is no less invidious because of a possible alternative means of communication. Virginia State Board of Pharmacy, supra, at 757-58, n. 15. But in any event, here there is no practicable alternative to news reporting. Institutional services such as Wainwright's are not for sale to members of the public. Even if they were, their cost would be prohibitive. And finally, it would be a physical impossibility for individual subscribers to read and analyze the hundreds of reports that are published.

The net effect of the prior restraint in this case is to deprive the public of economic information. It prevents individuals who are not privy to the institutional reports of the great financial houses from learning about these reports, which might vitally affect their personal economic decisions and which do vitally affect the economic future of the country. With respect, it seems extraordinary to deny the public access to these facts.

POINT IV

THE FACT THAT NEWS STORIES DESCRIBE COPYRIGHTED MATERIAL DOES NOT JUSTIFY PRIOR RESTRAINTS ON NEWSPAPERS.

The premise underlying the injunction here is that "the First Amendment does not provide a separate defense [from that of fair use] to a claim of copyright infringement," Plaintiff's Brief at 22; see District Court opinion, Jt. Appx. 217a. The premise is incorrect. The fair use doctrine involves the

question whether the expectations of a copyright holder have been disappointed, see Seltzer, "Exemptions and Fair Use in Copyright," 24 Bull. of the Copyright Soc'y 215, 242-43 (April 1977). But the First Amendment rights of the press and of the public are much broader; they cannot be outweighed by private disappointment, but only by a vital government interest. See, e.g., NAACP v. Button, 371 U.S. 415, 438 (1963); see also New York Times Co. v. United States, 403 U.S. 713 (1971) (concurring opinions of Justices Brennan, Stewart, and White).

To disprove Appellee's unsupportable assertion that the fair use doctrine "encompasses" the First Amendment, one need only look to the authoritative "tests" for the fair use defense contained in § 107 of the new Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976). Two of the four fair use tests are inconsistent on their face with well-established First Amendment standards. The first test turns on the "character" of the defendant's use, "including whether such use is of a commercial nature"; but it is plain that no publication loses First Amendment protection because it is sold for a profit. New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). Similarly, the fourth fair use test is the effect of the use upon the value of the copyrighted work. Yet it has been authoritatively recognized that "[t]he first amendment privilege, when appropriate, may be invoked despite the fact that the marketability of the copied work is thereby impaired," 1 Nimmer on Copyright, § 9.24, at 28.27 (1976).

Fair use tests might be suitable for a judgment whether a news article can be published in a certain style. But the injunction here prevents news from being published at all. Such a ban on news articles must be judged by constitutional standards, or else the First Amendment is subordinated to the detriment of the public's right to be informed about matters of great import.

The District Court opinion virtually recognizes this when it states that "the fact of Wainwright's issuing a report" may be news, and that the

"public has a right to know the facts" (Jt. Appx. at 216a). Inexplicably, however, Judge Lasker severely restricts the right to know: the public may only learn whether the reports are "bullish or bearish." The right to know is meaningless unless it includes the right to know in enough detail to permit judgment to operate. Restrictions on style may be appropriate; restrictions on the substance of news coverage cannot be. An injunction against reporting in detail (as in petitioners' July 5, 1976 article) can no more be justified under the First Amendment than could injunctions against Wall Street Journal articles like the one of August 22, 1975 (slip op. at 4196).

Wainwright's argument (Plaintiff's Brief at 22-28) that the doctrine of fair use "encompasses" the First Amendment rests on inapplicable authority. Petitioners' claim is not that newspapers are "immune" from the copyright laws, but that news may not be copyrighted. Plaintiff's cases are not to the contrary. For example, L.A. Westermann Co. v. Dispatch Printing Co., 249 U.S. 100 (1919), cited parenthetically by Mr. Justice White in New York Times Co. v. United States, supra, merely held that copyrighted pictures in an advertisement could not be appropriated and used by an advertiser competing with the copyright licensee. Chicago Record-Herald Co. v. Tribune Association, 275 F. 797 (7th Cir. 1921), explicitly stated that it was not prohibiting publication of news contained in copyrighted material. Plaintiff's two remaining cases involved wholesale copying, one from racing forms, the other of National Enquirer articles; the right to print news was not questioned.

Nor do petitioners maintain, as plaintiff suggests, that the First Amendment "nullifies" the copyright clause. Of course it does not. But the Amendment does exact a stricter standard against enjoining news articles than does the fair use doctrine. McGraw-Hill, Inc. v. Worth Publishers, Inc., 335 F. Supp. 415 (S.D.N.Y. 1971), cannot be read to state that the First Amendment and fair use protections are co-extensive. That case upheld a defense that

copying of an economics text had not been proved, and then said, in dicta and without further explanation, that defendant's unidentified First Amendment argument flew "in the face of established law." If the court felt that First Amendment and fair use standards for news articles are identical, it did not say so.*

In short, plaintiff is, without precedent or justification, attempting to place a fair-use straitjacket on newspapers. Virtually every day the press summarizes, quotes, and abstracts from copyrighted sources. Attribution is made, but quotes are extensive. If a six paragraph article about a 40 page report is inappropriate because it "sucks the marrow of the bone," then no copyrighted source which is newsworthy in itself can ever be reported upon by another newspaper. Indeed, in its implications for the daily press, the prior restraint affirmed herein is more harmful than the restraint at issue in New York Times Co. v. United States, 403 U.S. 713 (1971). The Pentagon Papers affair was a once-in-a-lifetime situation. But an injunction of the kind handed down here cripples day-to-day news reporting. If the injunction is upheld, the "marrow of the bone" of all copyrighted sources -- including the famous copyrighted Woodward and Bernstein articles in the Washington Post, the copyrighted Frost-Nixon interviews, or accusations in the National Audubon Magazine -- could not be reported in the press.**

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*Similarly, Walt Disney Productions v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972), involved only a challenge to a particular way of expressing ideas. The court explicitly declined to speculate whether the First Amendment might under other circumstances restrict the copyright protection of an author, 345 F. Supp. at 116.

**The United States Supreme Court just this week again recognized the overriding constitutional importance of news reporting. In Zacchini v. Scripps-Howard Broadcasting Co., No. 76-577 (June 28, 1977), it noted that a private performer's right to publicity "is closely analogized to the goals of patent and copyright law." The Court then stated that, while it would protect an entertainer against a television broadcast of his entire act, "it is evident... that petitioner's patent law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner's act." Slip op. at 11.

CONCLUSION

Only if the First Amendment permits an injunction against publishing the news can the broad injunction of the District Court be upheld. But the First Amendment forbids virtually all injunctions against publishing the news.

To deal with these fundamental questions the motion for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure or the motion for rehearing in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure should be granted.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Mark Dwyer , being duly sworn, deposes and says:

I am over the age of eighteen (18) years and am not a party to this action.

On the 30th day of June , 1977 I served a copy of the annexed paper upon:

Cahill, Gordon & Langdell, Esqs.
80 Pine Street
New York, New York 10005

by depositing a true copy of the same in a properly addressed post-paid wrapper in a regularly maintained official depository under the exclusive care and custody of the United States Postal Service located in the City, County and State of New York.

Sworn to before me this
30th day of June 1977

Mark Dwyer

Sylvia Allen
Notary Public

SYLVIA ALLEN
Notary Public, State of New York
No. 03-4621156
Qualified in Bronx County
Commission Expires March 30, 1979